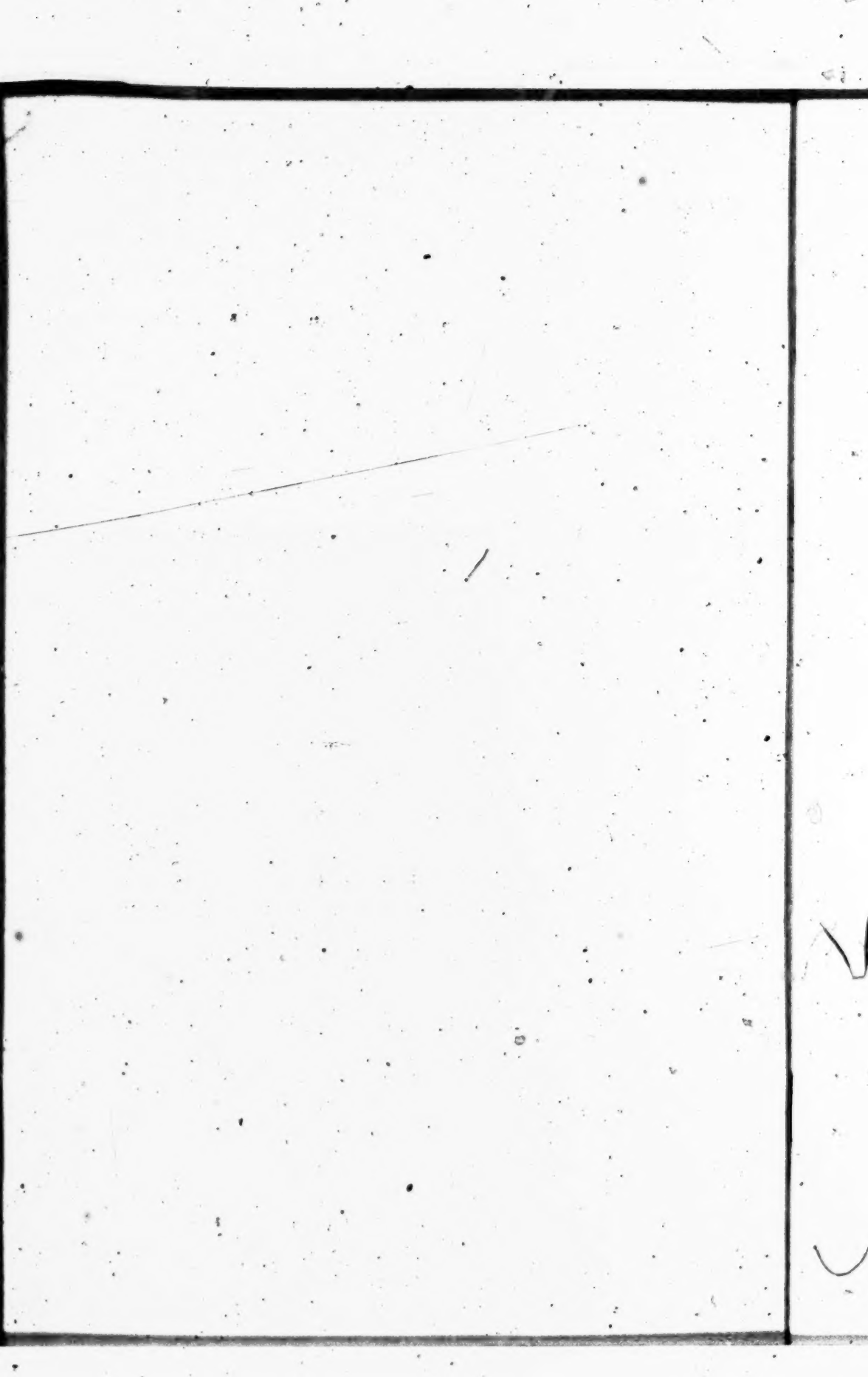

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Supreme Court of the United States

October Term, 1967

No. 267

NEBRO JOHNSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Appellate Term of the Supreme Court of New York, First Judicial Department, rendered January 17, 1968, which affirmed a judgment of the Criminal Court of New York, rendered July 18, 1967, convicting petitioner after trial of the offense of DISORDERLY CONDUCT (jostling) [Penal law, §722(6)], and the crimes of ASSAULT IN THE THIRD DEGREE [Penal Law, §244], and RESISTING ARREST [Penal Law, §1851], and sentencing him for the latter

crimes to serve a term of six months in the Workhouse. Sentence was suspended on the disorderly conduct charge. By certificate dated March 21, 1968, leave to appeal to the Court of Appeals of the State of New York was denied by the Honorable JOHN F. SCILEPPI, Associate Judge of that Court.

Questions Presented

1. Whether an actual breach of peace is required by the due process clause of the United States Constitution to support a conviction for disorderly conduct?
2. Whether Section 722(6) (jostling) of the New York Penal Law is unconstitutionally vague?
3. Whether the Constitution forbids a prosecution for forcible resistance to an arrest based on an unconstitutional statute?
4. Whether the latter issue is properly before this Court, since it was not passed upon below?

Statute Involved

Section 722 of the N.Y. Penal Law provided, as of the dates involved in this case:*

"Disorderly conduct

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may

* Under the revised N.Y. Penal Law (effective September 1967), subdivision six has been removed from the disorderly conduct statute, and re-enacted as the separate crime of jostling. N.Y. Penal L. §165.25.

be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

* * *

"(6) Interferences with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocket, pocketbook or handbag * * *."

Statement of the Case

Detective **Charles Langan**, of the Transit Authority Pickpocket Squad, testified that on February 17, 1967, he arrested the defendant after observing him surreptitiously opening and placing his hand inside a woman's pocketbook as she boarded a northbound train at 59th Street and Lexington Avenue Subway Station (12).* Prior to apprehending Johnson, the officer had also observed him standing on the platform while at least twelve trains passed, and on one occasion had seen him place his hand on the clasp of the purse of another woman commuter (9, 11).

After the officer showed Johnson his badge and said "you are under arrest for jostling," he escorted him up the escalator located in that station. Johnson, Detective Langan testified, attacked him and attempted to push him down the stairs. Langan thereupon tried to handcuff Johnson; however, petitioner bit the officer's thumb and punched and kicked him. He pushed the officer down the escalator (13). The officer chased and caught up with Johnson, grappled with him, Johnson kicked and punched him (13-14). Finally, a uniformed officer, upon hearing the commo-

* References are to record on appeal.

tion, ran over and intervened, subduing petitioner (12-14). Detective Langan further testified that he had shown Johnson his badge and told him the reason for the arrest when he had originally apprehended him (12, 23, 25).

The detective's testimony was confirmed in part by the testimony of Patrolman **Bernard Senator**, who stated that during the rush hour he heard a loud commotion, and upon approaching its source, saw two men rolling down the escalator shaft. Senator, recognizing his fellow officer, directed defendant to cease his resistance—which, however, he did not do, hitting the second officer in the chest, kicking him in the groin and knees; the officers were compelled to subdue him forcibly (31-2).

The defendant, **Nebro Johnson**, testified he had been convicted twelve years before the instant case for the identical crime (36). With respect to the case at bar, however, he asserted he had stepped off a Jerome Avenue local to allow other passengers to leave and had been unable to reboard that train (37). Thereafter, he had to wait until two other trains passed until another Jerome Avenue train arrived at the station. As he was about to board that train he was arrested by Langan for "jostling" (38). As the detective led him up the escalator, Johnson reported, "it hit my mind I didn't do nothing. I wouldn't take no arrest. I didn't do anything. I pulled against him" (39). The two men rolled down the stairs, and when defendant attempted to escape he was captured by a uniformed patrolman (39). The defendant denied the attempted theft (41) and also asserted that he had neither bitten nor hit the officers (42).

POINT I

No substantial Federal question is raised by the petition, for an actual breach of peace is not required by the due process clause of the United States Constitution to support a conviction for disorderly conduct.

Petitioner contends that the disorderly conduct statute (former N.Y. Penal Law, §722-6) has historically been applied only in those cases where an actual breach of the peace has occurred, and that such strict construction is required to preserve the constitutionality of the statute. Since no actual breach of peace occurred in the instant case (with respect to the jostling charge), he claims that he has been deprived of due process of law. His underlying premise is incorrect, however, for it is clear from both the explicit language of §722(6) of New York Penal Law, as well as from Court of Appeals cases construing that statute, that an actual breach of the peace is not required [see *People* v. *Monnier*, 280 N.Y. 77 (1939); *People* v. *Pieri*, 269 N.Y. 315 (1936)]. It is sufficient if a breach of the peace might have ensued from defendant's conduct.

> "The conduct charged must at least be such that a breach of peace has become imminent or might reasonably be expected or intended to flow from such conduct" [*People* v. *Monnier, supra* at 79].

The test established by the New York courts to determine whether "a breach of the peace may be occasioned" is whether defendant's conduct at the time, in the place and under the circumstances prevailing, led to or was reasonably likely to lead to disorder or public disturbance

[*People* v. *Chesnick,* 309 N.Y. 58 (1950); *People* v. *Nixon,* 248 N.Y. 182 (1939)]. It may not reasonably be argued that there was no evidence whatever of this element, such that the conviction deprived petitioner of due process. In the case at bar the time of the occurrence was 5:30 p.m. on a crowded subway station platform. No extensive argument is required to demonstrate the likelihood of public disorder had petitioner's attempted theft been discovered by his female victim as she boarded the train.

In any event, by any constitutional test of the breach of the peace statute as applied to jostling, the arresting officer had probable cause for an arrest, for a violation of that statute committed in his presence. Hence, even if ultimately guilt under the statute, as construed by petitioner, was not proved beyond a reasonable doubt, the arrest was valid, and petitioner had no right to assault the officer and resist the arrest. Hence, the convictions for the latter crimes are not affected by petitioner's claim as to breach of the peace conviction.

POINT II

Section 722(6) of the Penal Law of New York is not unconstitutionally vague.

Petitioner contends that "the language of the Penal Law of the State of New York, to wit, Section 722(6) 'with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned' is vague and ambiguous, so as to fail to create a clearly defined and ascertainable standard of conduct" (brief, p. 2). The preamble to the disorderly conduct statute, however, enjoins

conduct which is either actually or potentially disruptive of the public peace. The statute thereafter sets forth in detail what specific conduct is prohibited, for instance, in the section involved in the case at bar it forbids placing one's "hand in the proximity of [another's] pocket, pocketbook or handbag." It is clear that a violation of subdivision (6) is likely to occasion a breach of the peace as that term has been defined by the New York courts, that is, "a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community" [*People* v. *Most,* 171 N.Y. 423, 429 (1901); see also, *People* v. *Pieri,* 269 N.Y. 315 (1936); *People* v. *Monnier,* 290 N.Y. 77 (1939); *People* v. *Chesnick,* 302 N.Y. 58 (1950)]. This Court is, of course, bound to observe the gloss placed on the statute by New York's highest court [*United States* v. *Harris,* 347 U.S. 612 (1954); *Winters* v. *New York,* 333 U.S. 507 (1947)], which renders the statute's meaning abundantly clear.

It may be noted that the Legislature of the State of New York has recently revised the Penal Law, modifying the disorderly conduct statute to the extent of removing therefrom the section dealing with jostling. The latter act is now a misdemeanor rather than a mere offense, and is treated as a form of theft. The element of intent to breach the peace, complained of here, has been entirely removed from the revised statute. N.Y. Penal L. §165.25.

POINT III

The Constitution does not forbid a prosecution for forcible resistance to an arrest under a statute later deemed unconstitutional; in any case, the issue is not before this Court.

Since petitioner's constitutional attack on the jostling statute is ill-founded, there is no need to dwell at length upon petitioner's contention that he had the right to use force to resist an arrest made in good faith pursuant to that statute. Whether one may resist by force an "illegal" arrest, and what degree of force is permissible, is a question recently presented to this Court, but not decided [*Wainwright* v. *New Orleans*, —— U.S. ——, 88 S. Ct. 2243 (1968)]. In New York, it was held that a person may forcibly resist an illegal arrest unless the force is unreasonable or excessive [*People* v. *Cherry*, 307 N.Y. 308 (1954)], a rule considerably limited by a later appellate decision [*People* v. *McNeil*, 21 A.D.2d 1, *aff'd* 15 N.Y.2d 717 (1965)], and, still more recently, abolished altogether by a statute forbidding any forcible resistance to arrest [see N.Y. Penal Law, §35.27 (effective March 31, 1968)]. Prosecution, as here, for violent resistance to an arrest which was undertaken by the officer in good faith is well within the police powers of the state. The common law rule relied upon by petitioner is derived from an age when private citizens made the arrests. In these times of well-equipped police officers, permitting resistance to an arrest which the officer considers part of his duty serves no function; it does not deter the arrest, but leads to violence by both the citizen and the officer. Further, petitioner's conduct of punching,

kicking and pushing the officer down an escalator, then hitting his partner and kicking him in the groin, would surpass the common law limits of "reasonable resistance" [*People* v. *McNeil, supra*].

In any event, the issue treated herein was not shown to have been passed upon by the Appellate Term. Therefore, it is not properly raised before this Court.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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